STATE OF MICHIGAN

COURT OF APPEALS

THEODORE J. NELSON and JEANNE NELSON, Plaintiffs-Appellees,	UNPUBLISHED April 20, 2001
v	No. 220627 Oakland Circuit Court
VILLAGE OF MILFORD, Defendant-Appellant.	LC No. 98-005148-NO

Before: Talbot, P.J., and Sawyer and F. L. Borchard*, JJ.

PER CURIAM.

Defendant appeals by leave granted from a circuit court order denying its motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). We reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiffs' complaint sought damages under a theory of trespass-nuisance. The alleged nuisance was a broken tree limb dangling in a tree on the public right-of-way outside plaintiffs' house. Plaintiffs asserted that defendant was responsible because it had control over the tree and/or the property, it had notice of the broken limb, and failed to remove the limb in a timely manner.

The trial court's ruling on a motion for summary disposition is reviewed de novo. *Gibson v Neelis*, 227 Mich App 187, 189; 575 NW2d 313 (1997). When reviewing a motion decided under MCR 2.116(C)(8), the Court accepts as true all factual allegations and any reasonable inferences drawn from them in support of the claim. Summary disposition for failure to state a claim should be upheld only when the claim is so clearly unenforceable as a matter of law that no factual development could establish the claim and thus justify recovery. *Stott v Wayne Co*, 224 Mich App 422, 426; 569 NW2d 633 (1997), aff'd 459 Mich 999 (1999).

A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. In ruling on such a motion, the trial court must consider not only the pleadings, but also depositions, affidavits, admissions and other documentary evidence, MCR 2.116(G)(5), and must give the benefit of any reasonable doubt to the nonmoving party, being liberal in finding a genuine issue of material fact. Summary disposition is appropriate only if the opposing party fails to present

* Circuit judge, sitting on the Court of Appeals by assignment.

documentary evidence establishing the existence of a material factual dispute. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999).

At present, Michigan recognizes "a limited trespass-nuisance exception to governmental immunity." *Continental Paper & Supply Co, Inc v Detroit*, 451 Mich 162, 164; 545 NW2d 657 (1996). A trespass-nuisance is a "trespass or interference with the use or enjoyment of land caused by a physical intrusion that is set in motion by the government or its agents and result[s] in personal or property damage." The elements of trespass nuisance are "condition (nuisance or trespass); cause (physical intrusion); and causation or control (by government)." *Hadfield v Oakland Co Drain Comm'r*, 430 Mich 139, 169; 422 NW2d 205 (1988) (Brickley, J.). Accord *Peterman v Dep't of Natural Resources*, 446 Mich 177, 205; 521 NW2d 499 (1994). Absent proof that the defendant physically invaded the plaintiff's property by adding something to it, or allowed something from its own property to invade that of the plaintiff, there is no trespass. *Id.* at 205-207.

It is not disputed that defendant did not cause or create the nuisance or set it in motion. The plaintiffs admit that the storm caused the nuisance. While plaintiffs contend that defendant had control over the tree, the control element pertains to control over the intrusion itself or the property whence it came. *Continental, supra* at 164; *Peterman, supra* at 205. There has been no showing that defendant owned the tree or caused it to be placed on the property. Plaintiffs also contend that defendant had control over the property itself. Control may be found where the defendant owns the property where the nuisance arose or had absolute control over the property. *Continental, supra* at 165-166. Defendant contends that plaintiffs own the property and plaintiffs do not dispute that. They contend that defendant's easement rights over the property were sufficient to establish control. However, the *Continental* Court made clear that the owner of the land must "turn[ ] over the entire charge of the land" to the defendant, such that the defendant has control of the property "to the exclusion of all others" in order for the defendant "to be liable under a theory of trespass-nuisance for property it does not own or possess." *Id*. at 166, 168. Plaintiffs did not allege, nor have they presented any proofs to show, that defendant had that element of control over the property. Therefore, we find that the trial court erred in denying defendant's motion for summary disposition.

Reversed.

/s/ Michael J. Talbot
/s/ David H. Sawyer
/s/ Fred L. Borchard